IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANTOINE STRATTON, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	C.A. No. 08C-12-012 JRS
AMERICAN INDEPENDENT INSURANCE COMPANY,	)	
Defendant.	)	

Date Submitted: June 16, 2010
Date Decided: September 16, 2010

MEMORANDUM OPINION.
Upon Consideration of Defendant American Independent Insurance Company's Motion to Dismiss The Amended Complaint.
DENIED.

John S. Spadaro, Esquire, JOHN SHEEHAN SPADARO, LLC., Hockessin, Delaware. Attorney for Plaintiff.

Kevin J. Connors, Esquire, MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, Wilmington, Delaware. Attorney for Defendant.

SLIGHTS, J.

I.

Delaware's statutory no-fault automobile insurance scheme serves as the backdrop to this putative class action in which the plaintiff, Antoine Stratton ("Stratton"), alleges that his automobile insurer, defendant, American Independent Insurance Company ("AIIC"), has refused to provide him (and others similarly situated) the full benefit of mandated coverage.[1] By statute, AIIC and other Delaware automobile insurance carriers must provide, *inter alia,* personal injury protection ("PIP"), a no-fault coverage which pays for certain designated medical expenses and lost wages incurred by the insured after an automobile accident.[2] The statute provides that policyholders may elect to keep a deductible on their PIP coverage and further provides that insurers "shall recover any deductibles" paid by their insureds through subrogation actions against the tortfeasor's liability insurer.[3] Stratton alleges that AIIC routinely ignores its obligation to pursue recovery of its insured's deductibles and that it did so in connection with amounts he paid as a deductible from his PIP coverage.[4] His Amended Complaint seeks a declaratory judgment that AIIC (and, by

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[1] Pl.'s Am. (Proposed) Class Action Compl. (Transaction ID ("Tr. ID") 28079022) ¶ 3 [hereinafter "Am. Compl."].

[2] *See* 21 *Del. C.* § 2118.

[3] *See id.* § 2118(a)(2)(f).

[4] Am. Compl. ¶¶ 19, 22-25.

extension, other PIP insurers) are obligated by statute and contract to pursue PIP deductibles on behalf of their insureds and that AIIC routinely has failed to meet these obligations.[5]

At some point after Stratton filed his initial Complaint, AIIC avers that it pursued and recovered the portion of Stratton's deductible to which he was entitled.[6] It now moves to dismiss the Amended Complaint alleging that Stratton's claims are moot because he already has received from AIIC all that he has requested in his Amended Complaint. AIIC also alleges that Stratton's Amended Complaint mischaracterizes AIIC's statutory obligation to recover deductibles on behalf of its insureds and that Stratton has failed procedurally to perfect his claim for relief by failing to name necessary parties.

After considering the motion and Stratton's response, the Court has concluded that the circumstances surrounding AIIC's recovery of Stratton's deductible must be more thoroughly developed before the Court can determine whether Stratton has standing to pursue his claims for declaratory judgment. If Stratton does have standing, then the Court is satisfied that his interpretation of Delaware's PIP statute is not so far-fetched as to justify dismissal of his claims at this juncture of the

[5] *Id.* ¶¶ 1-2.

[6] *See* AIIC's Opening Brief in Support of Motion to Dismiss Plaintiff's Amended (Proposed) Class Action Complaint, (Tr. ID 29035513) at 4 [hereinafter "Def. Op. Br."]; *id.* Ex. C.

litigation. The final determination of the scope of AIIC's statutory and contractual obligation to recover its insured's deductibles must await further proceedings and possibly discovery. Finally, the Court has concluded that neither the tortfeasors nor their insurers are necessary parties to this narrowly drawn declaratory judgment action. Accordingly, AIIC's motion to dismiss the amended complain must be **DENIED.**[7]

II.

Stratton was injured in an automobile accident on January 27, 2006.[8] His automobile insurance policy with AIIC provides for the PIP coverage required by Delaware's no-fault insurance statute.[9] As permitted by statute, Stratton elected to subject his PIP coverage to a $1,000 per-accident deductible.[10] He incurred medical bills, exhausted his deductible to pay those bills, and then submitted claims over and above the deductible to AIIC for payment under his PIP coverage.[11] It appears that

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[7] The Court notes that there are at least three other cases presenting substantially similar or identical issues currently on the Court's docket: *Antonik v. Dairyland Ins. Co.*, CA No. 08C-09-418; *Kihoro v. Dairyland Ins. Co.*, CA No. 10C-01-114; *Seymour v. Nationwide Mut. Ins. Co.*, CA No. 08C-11-176. As discussed with counsel in this and the other cases, the Court has considered the briefing on similar motions in the other cases in deciding the Motion in this case.

[8] Am. Compl. ¶ 19.

[9] *Id.* ¶¶ 6-7.

[10] *Id.* ¶ 22.

[11] *Id.* ¶¶ 21-22.

AIIC has since reimbursed Stratton $700 of his $1000 deductible, an amount which reflects an arbitration panel's apportionment of 30% liability to Stratton for the January 27, 2006, accident.[12]

Stratton alleges that, like all others who have elected to subject their PIP coverage to a deductible, he is barred by statute from seeking recovery of his deductible directly from the tortfeasor or the tortfeasor's insurer.[13] Consequently, Stratton relied upon AIIC to exercise its statutory right of subrogation to seek reimbursement of the deductible on his behalf.[14] He alleges that AIIC routinely refuses to meet its statutory obligation to seek reimbursement of deductibles for its PIP policyholders and that policyholders who have been so aggrieved are entitled to a declaration from the Court of their rights under both their PIP policies with AIIC and the applicable statute.[15] He seeks to invoke the Court's authority to provide "corresponding declaratory relief" in connection with its class action jurisdiction so

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[12] *See* Def. Op. Br. 19; *id.* Ex. C.

[13] Am. Compl. ¶ 15. *See also* 21 *Del. C.* § 2118(a)(2)(f) ("An insured person may not plead and introduce into evidence in an action for damages against a tortfeasor the amount of the deductible; however, insurers shall recover any deductible for their insureds or their household members pursuant to subsection (g) of this section.").

[14] *Id.* ¶¶ 16-18.

[15] *Id.* ¶¶ 38-42.

that he may obtain relief for all AIIC policyholders similarly situated.[16] Stratton's Amended Complaint identifies the proposed class as "all of AIIC's Delaware insureds whose [] PIP coverage is subject to deductibles;" he also identifies a subclass of "AIIC's Delaware insureds who, at any time since December 1, 2005, have been entitled to have AIIC attempt recovery of deductibles paid, exhausted or satisfied under PIP coverages, where AIIC has failed or refused to attempt such recovery."[17]

III.

AIIC raises six arguments in its Motion: (1) Stratton lacks standing to pursue his claim now that AIIC has recovered his deductible from the tortfeasor; (2) Stratton's claims are not yet ripe because AIIC is not obliged to pursue its insured's deductibles until it makes a PIP payment and, in any event, the time within which AIIC was permitted to pursue recovery of his deductible had not yet run at the time he filed his complaint; (3) Stratton has not plead sufficient facts to support his claim that AIIC, in fact, could have recovered his deductible if it had attempted to do so because he has not pled that the tortfeasor's carrier has satisfied his bodily injury claim (a predicate

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[16] *See* Super. Ct. Civ. R. 23(b) ("An action may be maintained as a class action if the prerequisites of paragraph (a) are satisfied, and in addition . . . (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or *corresponding declaratory relief* with respect to the class as a whole . . . .") (emphasis added).

[17] Am. Compl. ¶ 2.

to the PIP carrier's right of subrogation); (4) Stratton has failed to join necessary parties – specifically the insurers of all the other drivers/tortfeasors involved in the accidents with putative class members; (5) Stratton has mischaracterized AIIC's statutory obligations to its insureds and, consequently, has failed to state a claim that AIIC has breached any statutory or contractual duty to him or its other insureds; and (6) Stratton has failed to state a claim on behalf of other similarly situated AIIC insureds because the circumstances surrounding their purported right to compel AIIC to recover their deductibles are highly case specific.[18]

Not surprisingly, Stratton takes issue with each of AIIC's grounds for dispositive relief. As to the argument that he lacks standing to pursue his claims, he disputes the factual basis for AIIC's contention that his demand for reimbursement of the PIP deductible has been fully satisfied.[19] Alternatively, he argues that AIIC cannot defeat a class action simply by "picking off" (settling for a nominal amount with) the class representative, regardless of whether he accepted reimbursement of his deductible from AIIC.[20] Finally, he argues that acceptance of his deductible from AIIC does not moot his claims because the payment does not constitute all of the relief

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[18] *See generally* Def. Op. Br.

[19] *See* Plaintiff's Answering Brief in Opposition To AIIC's Motion to Dismiss The Amended Complaint, (Tr. ID 29418524) 21-22 [hereinafter "Pl. Ans. Br."].

[20] *Id.* at 12-18.

he seeks.[21]

As to AIIC's arguments that he has mischaracterized the PIP insurer's statutory obligation to pursue reimbursement of its policyholder's deductibles, Stratton counters that the PIP statute's directive that PIP insurers "shall recover any deductible for their insureds" is clear on its face and requires PIP insurers to conduct a reasonable, good-faith evaluation, on a case-by-case basis, of the propriety of pursuing recovery of their insureds' deductibles.[22] According to Stratton, PIP insurers cannot forego this evaluation even in cases where the insurer has little or no financial stake in the subrogation process (e.g. when the PIP insurer has paid nothing or very little in PIP benefits such that a subrogation action to recover its PIP payments would not be desirable).[23] He argues that the PIP statute's "any deductible" language means just that – PIP insurers must recover "any deductible" paid by their insureds, even where the deductible has not been fully exhausted.[24]

In response to AIIC's argument that his claim is not ripe, Stratton argues that the three-year statute of limitations applicable to subrogation claims does not act as

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[21] *Id.* at 18-21.

[22] Plaintiff's Answering Brief in Opposition to AIIC's Motion To Dismiss [Initial] Complaint, (Tr. ID 23882040) 6-8 [hereinafter "Pl. 1st Ans. Br."].

[23] *Id.* at 7-8.

[24] *Id.* at 12-13.

a "claims-handling guideline" that directs the insurer regarding the time frame within which such claims should be commenced.[25] Instead, Stratton urges the Court to declare that PIP insurers must "act reasonably" in their consideration of whether and when to pursue subrogation actions on behalf of their insureds to recover PIP deductibles, even if to do so would require the initiation of a claim well before the expiration of the statute of limitations.

Finally, Stratton argues that he need not join "hundreds of other insurers as parties to this case" in order for the Court to construe the relevant portions of the PIP statute and determine whether AIIC's practices violate the statute's requirements.[26] He contends that the declaratory judgment he seeks on behalf of the class and subclass "poses no risk of prejudice to any other auto insurer."[27]

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[25] *Id.* at 13-14.

[26] *Id.* at 14.

[27] *Id.* at 24.

IV.

When evaluating a motion to dismiss under Rule 12(b)(6),[28] the Court must read the complaint generously, accept all of the well-pleaded allegations contained therein as true, and construe them in a light most favorable to the plaintiff.[29] In the context of a Rule 12 motion to dismiss, a complaint is 'well-plead' if it puts the opposing party on notice of the claim being brought against it.[30] A complaint will not be dismissed unless the plaintiff would not be entitled to recover under any reasonable set of circumstances susceptible of proof.[31] Stated differently, a complaint may not be dismissed unless it is clearly without merit, which may be determined as a matter of

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[28] In the Nature and Stage of the Proceedings section of its Opening Brief, AIIC states that, in addition to Rule 12(b)(6), it is also invoking Rule 12(b)(1) which directs the Court to dismiss actions over which it lacks subject matter jurisdiction. Def. Op. Br. 1. AIIC does not cite the rule again in its Opening Brief and does not expressly raise its jurisdictional defense in any of its arguments. To the extent AIIC intends to argue that the Court lacks subject matter jurisdiction over this controversy because Stratton lacks standing to bring this action, the Court will address the appropriate legal standards that govern the Court's review of that argument later in this opinion. Likewise, the Court will address the Rule 19 standard of review when addressing the merits of AIIC's argument that Stratton has failed to join necessary parties.

[29] *See In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 326 (Del. 1993) (finding that the reviewing court must accept the allegations of the complaint as true); *Browne v. Robb*, 583 A.2d 949, 950 (Del. 1990) ("The complaint sufficiently states a cause of action when a plaintiff can recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.") (internal citation omitted); *Johnson v. Gullen*, 925 F. Supp. 244, 247 (D. Del. 1996) (same).

[30] *Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995).

[31] *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. 1983).

law or fact.[32]

In this case, Stratton argues that AIIC's Motion "relies on testimony and events that fall outside both the complaint and the insurance contract." He urges the Court to convert the Motion to a motion for summary judgment and to allow for a thorough development of the factual record as contemplated by the Rule 56 standard of review before addressing any case dispositive issues.[33]

Stratton is correct that both parties have submitted extraneous documents in support of their respective positions. AIIC has submitted the Affidavit of Roy Stiles ("Stiles Affidavit"), supervisor of AIIC's Subrogation Department, ostensibly to support its assertion that Stratton has been reimbursed the recoverable amount of his deductible.[34] Stratton has submitted Certifications from his attorneys that raise issues regarding the circumstances in which AIIC pursued the reimbursement and paid it to Stratton.[35] The Stiles Affidavit serves as the factual basis for AIIC's legal position that Stratton lacks standing to pursue his claim because he has not sustained an injury. Stratton's submission of his attorneys' Certifications in response to the Stiles Affidavit

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[32] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

[33] Pl. Ans. Br. 11.

[34] Def. Op. Br. Ex. C.

[35] Pl. Ans. Br. Exs. A, B.

serve as the factual basis of his legal position that AIIC has improperly attempted to "pick him off" as a class representative.

The parties have offered the extraneous materials for the truth of their contents and they are integral to their arguments regarding Stratton's standing to bring this action, individually or as class representative. Accordingly, the Court must consider at least some aspects of AIIC's standing argument under the summary judgment standard of review contemplated by Rule 56.[36]

In deciding a motion for summary judgment, the Court must determine whether genuine issues of material fact remain for trial.[37] Summary judgment will be granted only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[38] If the record reveals that material facts are in dispute, however, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record *sub judice*, then summary judgment

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[36] *See* Del. Super. Ct. Civ. R. 12(b) & 56(b); *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) ("When the trial court considers matters outside of the complaint, a motion to dismiss is usually converted into a motion for summary judgment and the parties are permitted to expand the record."); *Mell v. New Castle County,* 835 A.2d 141, 144 (Del. Super. 2003) ("If the extraneous matters have been offered to establish their truth, the court must convert the motion to dismiss to a motion for summary judgment.").

[37] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

[38] *Id.*

must be denied.[39]

The moving party bears the initial burden of demonstrating that the undisputed facts support his claim for dispositive relief.[40] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that material issues of fact remain for resolution by the ultimate fact-finder and/or that the movant's legal arguments are unfounded.[41] In this regard, "Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to that party's case."[42]

V.

As stated at the outset of this opinion, Stratton brings his Amended Complaint seeking declaratory relief against the backdrop of Delaware's statutory no-fault insurance scheme. Before addressing the merits of AIIC's motion to dismiss, therefore, it is appropriate to summarize the statutory landscape in which it is brought.

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[39] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[40] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole*, 180 A.2d at 470).

[41] *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[42] *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

PIP coverage is mandated for all vehicles registered and insured in Delaware.[43] The PIP statute sets minimum limits for coverage and, at § 2118(a)(1)(f), expressly allows PIP insureds to "elect to have [their PIP coverage] subject to certain deductibles." PIP coverage is a no-fault coverage, meaning the benefits are available to the insured regardless of whether *vel non* the insured was at fault for the automobile accident that prompted the need for PIP benefits to be paid.[44] In keeping with PIP's no-fault status, insureds are precluded by statute from seeking to recover amounts paid to them in PIP benefits, or any amounts they have paid in deductibles, directly from any tortfeasor or the tortfeasor's insurers.[45] The PIP insurer, however, is granted a statutory right of subrogation so that it might pursue (in the name of its insured) recovery of any PIP benefits it has paid from the tortfeasor's liability carrier.

The statute prescribes an arbitration format for the subrogation actions and limits the PIP insurer's recovery to "the maximum amounts of the tortfeasor's liability coverage available for the injured party, after the injured party's claim has been settled

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[43] 21 *Del. C.* § 2118(a) ("No owner of a motor vehicle required to be registered in this State . . . shall operate or authorize any other person to operate such vehicle unless the owner has insurance on such motor vehicle providing the following minimum insurance coverage: . . . . (2) a. Compensation to injured persons for reasonable and necessary expenses incurred within 2 years from the date of the accident for: 1. Medical, hospital, dental, surgical, medicine, x-ray, ambulance, prosthetic services, professional nursing and funeral services . . . .").

[44] *Id.*

[45] 21 *Del. C.* §§ 2118(a)(1)(f) & (h).

or otherwise resolved."[46] In addition to allowing PIP carriers to recover the PIP payments they have made to their insureds, the PIP statute also provides that the PIP "insurers shall recover any deductible for their insureds" by way of subrogation. This, of course, recognizes that the insureds themselves are precluded by statute from recovering their deductibles directly from the tortfeasor or his liability insurer.[47] It is this circumstance – when the PIP insured pays out some or all of his deductible but is precluded by statute from recovering it directly from the tortfeasor or his liability insurer – that is at the heart of Stratton's claim for declaratory relief.

A. Stratton's Standing To Bring This Action Remains In Question

AIIC urges the Court to dismiss the Amended Complaint because it has already given Stratton all that he has asked for, and all that he is entitled to receive, by timely pursuing and ultimately recovering all that it could recover of his deductible. According to AIIC, it initiated the statutorily-prescribed arbitration on Stratton's behalf and the arbitration panel determined that Stratton was entitled to recover 70% of the $1000 deductible he paid out-of-pocket for medical and other PIP-related expenses.[48] AIIC alleges that it has paid the $700 to Stratton and that he has accepted

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[46] *Id.* § 2118(g)(1).

[47] *Id.* §§ 2118(a)(1)(f) & (h).

[48] The arbitration panel apparently found that Stratton was contributorily negligent and allocated 30% fault to him. *See* Op. Br. 4; *id.* Ex. C at ¶ 4.

it.[49] Having received all that he is entitled by statute to receive, AIIC contends that Stratton may not be heard to argue that AIIC has ignored (or routinely ignores) its statutory obligation to pursue PIP deductibles for its insureds.

"The party invoking the jurisdiction of a court bears the burden of establishing the elements of standing."[50] One's "standing" to bring a claim depends upon his right to invoke the jurisdiction of the court "to enforce a claim or redress a grievance."[51] "Unlike the federal courts, where standing may be subject to stated constitutional limits, state courts apply the concept of standing as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are 'mere intermeddlers.'"[52] Even so, our Supreme Court "has recognized that the *Lujan* requirements (as expressed by the Supreme Court of the United States) for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware."[53] In order to establish standing, *Lujan* requires:

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[49] Def. Op. Br. Ex. C, ¶ 5.

[50] *Dover Historical Soc. v. City of Dover Planning Com'n*, 838 A.2d 1103, 1109 (Del. 2003) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

[51] *Id.* at 1110.

[52] *Id.* at 1111.

[53] *Id.*

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[54]

"At the pleading stage, general allegations of injury are sufficient to withstand a motion to dismiss because it is 'presume[d] that general allegations embrace those specific facts that are necessary to support the claim.'"[55] "[W]here the issue of standing is related to the merits, a motion to dismiss is properly considered under Rule 12(b)(6) rather than 12(b)(1)."[56]

In this case, if the Court was to consider only the allegations of the Amended Complaint and view them in the light most favorable to Stratton, the Court would readily find that Stratton has standing to bring his claim. Stratton alleges that he suffered an "injury in fact" that is directly "trace[able] to the challenged action of the defendant," namely that the value of his PIP insurance has been and will continue to be diminished by AIIC's practice of declining in good faith to pursue recovery of its

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[54] *Lujan*, 504 U.S. at 560-61 (internal citations omitted).

[55] *Dover Historical Soc.*, 838 A.2d at 1109 (quoting *Lujan*, 504 U.S. at 561).

[56] *Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1280 (Del. 2007).

insureds' PIP deductibles via subrogation. In addition, the injury Stratton identifies "likely" would be redressed by a decision in his favor.[57] If the Court finds that AIIC has not met its obligations under the PIP statute or Stratton's insurance policy, and directs AIIC to engage in practices that will comport with Stratton's interpretation of the PIP statute, then Stratton's automobile insurance policy will regain whatever value it lost as a result of AIIC's past practices. On a motion to dismiss, the Court would be obliged to accept these well plead allegations of the Amended Complaint as true.

The standing issue is confounded by AIIC's submission of the Stiles Affidavit and its assertion that Stratton has, in essence, settled his individual claim against AIIC by accepting its $700 payment (reflecting the amount AIIC was able to recover from the tortfeasor in reimbursement of Stratton's deductible). This purported settlement of the claim, not addressed in Stratton's Amended Complaint, calls the question of whether Stratton may continue to prosecute this action on behalf of the class or subclass when his individual (albeit nominal) claim allegedly has been resolved.

For his part, Stratton (through his attorneys' Certifications) questions the *bona fides* of AIIC's assertion that he has reached a negotiated resolution of his individual claim against AIIC. Specifically, Stratton points to the fact that his attorneys were not included in the negotiations leading up to, or in the decision to accept, any payments

[57] *Id.*

AIIC may have made as reimbursement of Stratton's deductible. Stratton urges the Court to weigh-in on the question of whether a defendant may "pick off" a proposed class representative by purporting to settle that plaintiff's nominal individual claim prior to class certification. Given that Stratton's standing to prosecute this action has legitimately been challenged, the Court must consider whether there is a factual or legal basis to invoke the Court's subject matter jurisdiction over the claim in its current posture.

The Court has found no definitive answer to the question of whether a class representative's settlement of his individual claim renders his class claims moot. To be clear, it is well-settled that *after* a class has been certified, the resolution of the named plaintiff's claim will *not* render the entire class action moot.[58] By that time, the class has "acquire[d] a legal status separate from the interest asserted by [the named plaintiff]."[59] Courts take a different view when the substantive claim of the named plaintiff in a proposed class action is mooted (by settlement or otherwise) *prior* to certification. In such instances, the resolution of the individual claim generally will

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[58] *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 401 (1975) (noting that a case where "the issue sought to be litigated escapes full appellate review at the behest of any single challenger, does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs"); *Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004) ("[I]t appears to be settled that once a class has been certified, mooting a class representative's claim does not moot the entire action . . . .").

[59] *Weiss*, 385 F.3d at 342 (citing *Sosna*, 419 U.S. at 399).

render the proposed class action moot since the interest of the class has not yet been recognized.[60] Several courts have created an exception to this general rule, however, in cases where the defendant intentionally manufactures a standing argument by paying out the underlying claim in an effort to "pick off" the named plaintiff(s) in order to evade judicial review of the class claim.[61]

In determining whether a plaintiff may still seek class certification after his claim on the merits expires (by settlement or otherwise), the Court must focus, *inter*

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[60] *See Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 343 (3d Cir. 2003) (citing *Lusardi v. Xerox Corp.*, 975 F.2d 964, 974 (3d Cir. 1992)) ("[W]hen claims of the named plaintiffs become moot before class certification, dismissal of the action is required.").

[61] *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("A district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings. To deny the right to appeal simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration.") (footnote omitted); *Weiss*, 385 F.3d at 347 ("The mootness exception recognizes that, in certain circumstances, to give effect to the purposes of Rule 23, it is necessary to conceive of the named plaintiff as a part of an indivisible class and not merely a single adverse party even before the class certification question has been decided. By relating class certification back to the filing of a class complaint, the class representative would retain standing to litigate class certification though his individual claim is moot."); *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1050 (5th Cir. 1981) ("[W]hile we recognize that the named plaintiffs in this case have not presented claims which by their nature are so transitory that no single named plaintiff with such a claim could maintain a justiciable case long enough to procure a decision on class certification, we believe that the result should be no different when the defendants have the ability by tender to each named plaintiff effectively to prevent any plaintiff in the class from procuring a decision on class certification."); *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 869 (7th Cir. 1978) ("We consider the motion for certification, while pending, as sufficiently, though provisionally, bringing the interests of class members before the court so that the apparent conflict between their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole.").

alia, on the plaintiff's "personal stake" in class certification.[62] Where a plaintiff continues vigorously to advocate for his right to class certification in a concrete and factual setting capable of judicial resolution, he has a personal stake in obtaining class certification and, therefore, has standing to appeal the denial of class certification.[63] A "desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation and for which they assert a continuing obligation" provides a sufficient "personal stake" to maintain standing under these circumstances.[64]

In addition to considering the putative class plaintiff's personal stake in the litigation, the Court must also look to the circumstances surrounding the "expiration" of the plaintiff's claim in order to determine his standing to continue in the litigation.[65] When a plaintiff voluntarily accepts a full, negotiated settlement of his individual claims, his "personal stake" in the litigation evaporates as does his standing to

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[62] *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) ("[I]n determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits 'expires,' we must look to the nature of the 'personal stake' in the class certification claim.").

[63] *Id.* at 404.

[64] *Roper*, 445 U.S. at 334 n.6.

[65] *Lusardi*, 975 F.2d at 974.

continue as class representative.[66]

The policy considerations that animate the judicially-expressed concerns regarding the practice of "picking off" class representatives are compelling. The practice frustrates and offends the purposes of Rule 23, judicial economy, and common notions of fair play.[67] Accordingly, the Court has no hesitation in following the direction of those courts that have held that an inquiry into the circumstances surrounding the "expiration" of the named plaintiff's claim is appropriate before determining if the plaintiff lacks standing to prosecute the proposed class action. In this regard, AIIC argues that *Lusardi v. Xerox* should guide the Court's inquiry.[68] In *Lusardi*, the plaintiffs negotiated a settlement agreement with the defendant prior to class certification.[69] The Court noted that the settlement occurred after "lengthy settlement negotiations" and in accordance with a rather detailed "memorandum of understanding."[70] Following the general rule that "[s]ettlement of a plaintiff's claim moots the action," the Court held that by voluntarily settling their claims against the

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[66] *Cf. Weiss*, 385 F.3d at 343-44 (noting that the concerns regarding the practice of "picking off" class plaintiffs arise in the context of rejected offers to settle or coerced settlements [e.g. Rule 68 offers of judgment].

[67] *Id.*

[68] *Lusardi*, 975 F.2d at 968.

[69] *Id.*

[70] *Id.*

defendant prior to class certification the named plaintiffs forfeited their standing to prosecute the proposed class action.[71]

Lusardi provides thoughtful and thorough treatment of the effect of a voluntary, negotiated settlement of the named plaintiff's individual claim on that plaintiff's ability to prosecute a class action prior to class certification. Unlike the case *sub judice*, however, the circumstances surrounding the settlement of the *Lusardi* plaintiffs' claims were fully developed and apparently not in dispute. The Stiles Affidavit and Stratton's attorney Certifications offer very different perspectives regarding the circumstances surrounding AIIC's payment to Stratton and the extent to which that payment represents a voluntary, negotiated resolution of Stratton's individual claim against AIIC. The Court is satisfied, therefore, that it is "desirable to inquire [more] thoroughly into [the facts] in order to clarify the application of the law to the circumstances."[72] The Court must determine if there is a factual basis to conclude that AIIC has attempted to "pick off" Stratton as a class representative. If it did, then Stratton's claim is not moot and he has standing to continue to prosecute this action. If, on the other hand, AIIC and Stratton entered into a voluntary, negotiated resolution of Stratton's claim against AIIC, then, in accordance with the

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[71] *Id.* at 974.

[72] *Ebersole*, 180 A.2d at 468-69.

general rule, Stratton's claim against AIIC would be moot and his standing to prosecute the claim extinguished.[73]

Stratton's standing is a threshold legal issue for determination by the Court.[74] Accordingly, the Court directs that limited discovery of the circumstances surrounding AIIC's payment shall be conducted forthwith, according to a stipulated schedule to be proposed by the parties, with final resolution of the issue on a full record to occur if possible on cross motions for summary judgment.

B. Stratton's Claims Are Ripe

For the sake of efficiency, the Court will address AIIC's argument that Stratton seeks to impose upon it an obligation that extends beyond the mandate of Delaware's PIP statute. Specifically, AIIC points to the three-year statute of limitations applicable to PIP subrogation claims and argues that Stratton would have the Court declare that AIIC is obliged to pursue recovery of his deductible well before the statute of limitations expires. AIIC notes that this obligation is neither expressly nor implicitly imposed by the PIP statute and, consequently, any claim that AIIC has failed to meet its statutory obligation to recover PIP deductibles for its insureds must await the

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[73] The Court rejects Stratton's contention that his individual claim for declaratory relief would remain viable even after he voluntarily accepted AIIC's recovery of his PIP deductible in full settlement of his claim. In this context, the resolution of the declaratory judgment claim would be purely hypothetical.

[74] *Dover Historical Soc.*, 838 A.2d at 1109.

expiration of the statute of limitations applicable to such claims. Stated differently, AIIC contends that Stratton's claim is not ripe until he can plead that: (a) the subrogation statute of limitations has expired; and (b) AIIC has not pursued recovery of the deductible on his behalf.[75]

Stratton argues that AIIC has mischaracterized his claim. He points out that AIIC, in its briefing and in its past practices, has revealed a fundamental misunderstanding of its statutory obligations to its insureds that must be clarified by declaratory judgment. According to Stratton, AIIC is of the view that it need not pursue recovery of its insured's deductibles unless and until it has made a PIP payment that would give rise to its right to recover such payment(s) from the tortfeasor's carrier and unless or until the insured has exhausted his deductible. Thus, according to Stratton, the real question is whether this differing view of a PIP insurer's statutory obligations alone is enough to invoke the "corresponding declaratory relief" jurisdiction of Rule 23.

"The existence of an actual controversy between the parties is a jurisdictional fact in actions for declaratory judgments under 10 *Del. C.* § 6501."[76] Although

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[75] *See* Def. Op. Br. 8 ("Plaintiff's Amended Complaint is likely premature because it has been filed before the statute of limitations [to recover his deductible] has run....").

[76] *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. 1964).

Delaware has adopted the Uniform Declaratory Judgment Act, which does not specifically require an "actual controversy" before the Court can grant declaratory relief, the "requirement is embodied within the declaratory judgment acts of those states following the Uniform Act as well as in the Federal Declaratory Judgment Act."[77] In addition to pleading a ripe individual claim, under the "corresponding declaratory relief" provision of Rule 23, a plaintiff must plead a ripe class claim as well.[78]

In order to present an "actual controversy," the allegations of the complaint must satisfy four conditions:

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be

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[77] *Playtex Family Prods. Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 687 (Del. Super. 1989)(holding that the "actual controversy" requirement is implicit in Delaware's adoption of the Uniform Act).

[78] The purpose of the "corresponding declaratory relief" provision of Rule 23 is "to ensure that where the Court is asked to regulate ongoing behavior affecting a wide range of persons, it will have jurisdiction over all those affected so that equitable relief may be fashioned that fully deals with the interests involved." 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 13.28 (3d ed. 1998). "The type of 'corresponding declaratory relief contemplated for certification under [Rule 23(b)(2)] is that which as a practical matter either affords injunctive relief or will serve as the basis for later injunctive relief.'" *Id.* (quoting *Nottingham Partners v. Dana*, 564 F. Supp. 1089, 1096 (D. Del. 1989)). The Court acknowledges that it lacks jurisdiction to award injunctive relief. Thus, the furthest any "corresponding declaratory relief" from this Court can go is to "serve as the basis for later injunctive relief" from another court.

> between parties whose interest are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.[79]

Delaware Courts have established a separate framework for analyzing the "ripeness" requirement.[80] This framework requires a balancing of two competing interests: the remedial interests of early resolution of an unripe controversy before actual harm has occurred, and "those of judicial economy and legal stability which augur for restraint."[81] The balancing process contemplates "the exercise of judicial discretion which should turn importantly upon a practical evaluation of the circumstances of the case."[82] As *Playtex* succinctly stated:

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[79] *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973). *See also Stroud v. Milliken Enter., Inc.*, 552 A.2d 476, 479 (Del. Super. 1989) (holding that the *Rollins* test remains applicable despite Delaware's subsequent adoption of the Uniform Declaratory Judgment Act).

[80] *O'Brien Corp. v. Hunt-Wesson, Inc.*, 1999 WL 126996, at *4 (Del. Ch. Feb. 25, 1999).

[81] *Playtex*, 564 A.2d at 687. The *Playtex* court found that restraint in the exercise of jurisdiction over inchoate claims was necessary because "[w]ithout such a restriction judicial resources would be wasted on hypothetical or moot cases, or on situations where a judicial declaration would not end the controversy between parties." *Id.* at 686 (citing *Heathergreen Commons Condo. Ass'n v. Paul*, 503 A.2d 636, 640-41 (Del. Ch. 1985)). Moreover, although courts have a role in "creating or finding the law," they "are limited to acting in an incremental, fact driven manner." *Id.*

[82] *O'Brien*, 1999 WL 126996, at *4 (citing *Stroud*, 552 A.2d at 480) (internal citation omitted). *See also Burlington Northern R. Co. v. Allianz Underwriter Ins. Co.*, 1991 WL 215914, at *3 (Del. Super. Oct. 15, 1991) ("The ripeness question is at bottom a question of practicality. It asks whether a court should burden itself and the other litigants it serves with determining questions which may never need answering and whether defendants should be burdened with defending a lawsuit which may prove ultimately to have no point.").

> The question I am presented with is whether the facts of the situation are sufficiently developed to allow me to render a declaratory judgment that will lay the matter to rest. If, on the other hand, in the course of adjudicating this matter I would be forced to construct hypothetical factual situations on which I could then rule, this matter is not ripe for adjudication.[83]

In this case, the Court must determine if the parties' very different interpretations of AIIC's statutory obligation to recover PIP deductibles is ripe for determination. So, the Court must ask: can this controversy be resolved without engaging in a series of hypothetical scenarios? Before answering this question, however, it is appropriate to step back and look precisely at the relief Stratton has requested in his Amended Complaint. After alleging that he and AIIC take different views of AIIC's obligations under the PIP statute,[84] Stratton seeks a judgment that, *inter alia*, will "declar[e] the parties' rights, duties, status or other legal relations under 21 *Del. C.* § 2118 and the disputed insurance contracts," and will "declar[e] that AIIC must attempt in good faith to recover applicable PIP deductibles on behalf of class members."[85] By casting his requests for declaratory relief in this manner, Stratton left

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[83] *Playtex*, 564 A.2d at 688 (citing *Rollins*, 303 A.2d at 662-63; *Bank of Del. v. Allstate Ins. Co.*, 448 A.2d 231, 234 (Del. Super. 1982)). *See also* 10 *Del. C.* § 6506 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, will not terminate the uncertainty or controversy giving rise to the proceeding.").

[84] *See* Am. Compl. ¶¶ 38-41.

[85] *Id.* WHEREFORE clause, 44(b) & (c).

open the possibility that the Court might declare that AIIC's statutory obligation to pursue PIP deductibles is exactly as AIIC interprets it, i.e., that it is triggered by its payment of PIP benefits but not mandated until just before the expiration of the subrogation statute of limitations, and only after the insured has settled his bodily injury claim with the tortfeasor's carrier. Of course, in his opposition to the motion *sub judice*, Stratton urges the Court to construe the insurer's statutory obligation "to recover any deductible for their insured" very differently. The point is that Stratton's Amended Complaint has not asked expressly for a declaration that AIIC has violated its statutory obligations. Rather, he has set the table to reveal the parties' controverted views of the statute and has asked the Court to declare whose view is correct. This controversy, so framed, is very real; it is not hypothetical. While the question remains (to be addressed below) whether Stratton's Amended Complaint states a legally viable claim, i.e., whether his characterization of the PIP statute can withstand a motion to dismiss, the Amended Complaint will not be dismissed for failing to state a "ripe" claim.[86]

C. Stratton's Amended Complaint States A Legally Viable Claim

AIIC's interpretation of its obligation to recover its insured's deductibles can

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[86] *See Tenneco Automotive Inc. v. El Paso Corp.*, 2001 WL 1641744, at *7, 10 (Del. Ch. Nov. 29, 2001) (denying motion to dismiss on ripeness grounds, but granting in part motion to dismiss for failure to state a claim upon which relief can be granted).

be summarized as follows: (1) the obligation is not triggered until it has made a PIP payment such that it would have a right to seek recovery of such payments from the tortfeasor's liability carrier through subrogation; (2) the obligation is not triggered until the PIP deductible has been exhausted; (3) the obligation is not triggered until the insured's bodily injury claim against the tortfeasor has been resolved by settlement or otherwise; and (4) the obligation may be fulfilled at any time within the subrogation statute of limitations.

Stratton, on the other hand, interprets the statute to require the PIP carrier: (1) to pursue recovery of PIP deductibles regardless of whether it has paid any PIP benefits; (2) to pursue recovery of *any* deductible paid by the insured, not just fully "exhausted" deductibles; (3) to pursue recovery of the deductible at the appropriate time in relation to the resolution of the insured's bodily injury claim against the tortfeasor; and (4) to assess in good faith whether recovery of the PIP deductible is viable at the soonest practicable opportunity notwithstanding the subrogation statute of limitations. The Court will address the statutory arguments *seriatim.*

1. The PIP Carrier's Obligation To Recover PIP Deductibles Does Not Depend Upon Whether It Has Paid PIP Benefits

In its Opening Brief, AIIC argues that the PIP statute allows "that the PIP

insurer *may* [] seek subrogation of its insured's PIP deductible."[87] AIIC goes on to argue that this permissive charge is somehow linked to its payment of a PIP benefit to its insured. But this is not what the statute says. Rather, the statute provides that PIP "insurers *shall* recover *any* deductible for their insureds . . . pursuant to subsection (g) of this section."[88] The statute's direction is not permissive; it is mandatory.[89] In this regard, at least, the statute is clear and unambiguous.[90] Simply stated, AIIC's contention that it need not pursue subrogation of its insured's deductible until it has paid a PIP benefit finds no support in the clear mandate of the statute.

AIIC's argument, in addition to bucking the mandate of the statute, would frustrate one of the primary designs of the statute – separating the prompt processing

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[87] Def. Op. Br. 6 (emphasis added).

[88] *See* 21 *Del. C.* § 2118(a)(2)(f).

[89] *See* 3 Sutherland, *Statutes & Statutory Construction,* § 57:2 (7th Ed. 2008)("Shall" is considered presumptively mandatory unless there is something in the context or character of the legislation that requires it to be looked at differently."); *Del. Citizens for Clean Air v. Water & Air Resources Comm'n,* 303 A.2d 666,667 (Del. Super. 1973), *aff'd*, 310 A.2d 128 (Del. 1973) ("While the words 'shall' and 'may' do not always by themselves determine the mandatory or permissive character of a statute, it is generally presumed that the word 'shall' indicates a mandatory requirement."); *Gow v. Consolidated Coppermines Corp.*, 165 A. 136, 140 (Del. Ch. 1933) ("[W]here a question of constitutionality is not dependent on the construction, it is ordinarily the rule that 'shall' is presumed to have a meaning of command rather than of permission.").

[90] The Court is satisfied that the PIP statute mandates that the insurer do *something* with respect to the recovery of its insured's deductibles. It cannot choose to do nothing. As discussed below, what that "something" is, however, remains an open question. *cf. Eliason v. Englehart,* 733 A.2d 944, 946 (Del. 1999) ("If a statute is unambiguous there is no need for judicial interpretation, and the plain meaning of the statute controls.").

of PIP-related claims from the underlying bodily injury (liability) action.[91] Just prior to the mandate that PIP insurers recover any deductibles for their insureds, the statute makes clear that PIP insureds may not pursue recovery of their deductibles directly from the tortfeasor or his carrier.[92] AIIC's construction would allow PIP carriers to elect not to pursue recovery of even substantial deductibles paid-out by their insureds in cases where the insured was not primarily at fault for the accident simply because the insured did not reach his PIP coverage. AIIC has pointed to nothing in the PIP statute that would suggest the General Assembly intended that PIP policyholders should be left without a remedy in such circumstances, and the Court can discern no such intent in its own reading of the statute.

AIIC's reliance upon *Harper v. State Farm Mut. Auto. Ins. Co.*[93] is misplaced. In *Harper,* the Court considered when the statute of limitations for a PIP subrogation action would begin to run and concluded that the claim accrues only after the first PIP payment has been paid.[94] The Court did not come close to addressing the question at

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[91] *See Selective Ins. Co. v. Lyons,* 681 A.2d 1021, 1024 (Del. 1996).

[92] *See* 21 *Del. C.* § 2118(a)(2)(f) ("An insured may not plead . . . against a tortfeasor the amount of the deductible . . . .").

[93] 703 A.2d 136 (Del. 1997).

[94] *Id.* at 140-41.

issue here – must (or may) the PIP carrier wait to pursue PIP deductibles for its insureds until after it pays a PIP benefit? *Harper's* holding that the PIP subrogation cause of action accrues when the PIP carrier makes a payment, not when the accident occurs, does not inform the Court's analysis here and certainly does not support AIIC's permissive construction of § 2118(a)(2)(f).

2. The PIP Carrier's Obligation To Recover PIP Deductibles Does Not Depend Upon Whether The Deductible Has Been Exhausted

Here again, AIIC's contention that it need not pursue recovery of a PIP deductible unless the PIP deductible has been exhausted finds no support in the clear and unambiguous language of § 2118(a)(2)(f). And, once again, AIIC has not referred to any other provisions of the PIP statute or any other authority that would support this construction and the Court can find none. The Court is compelled to conclude, therefore, that the obligation to pursue PIP deductibles referenced in § 2118(a)(2)(f) refers to "*any* deductible," as stated in the statute, not just exhausted deductibles.[95]

3. The PIP Insurer May Pursue Recovery Of The PIP Deductible Prior To The Resolution of The PIP Insured's Bodily Injury Claim

As previously noted, the PIP insurer must pursue its insured's deductible

[95] 21 *Del. C.* § 2118(a)(2)(f) (emphasis added).

"pursuant to subsection (g) of [the PIP statute]."[96] "[S]ubsection (g)" sets forth the process by which the PIP insurer may seek to recover from the tortfeasor's liability carrier any PIP benefits it has paid to its insured. It states that the PIP carrier is "subrogated to the rights [and] claims . . . of the person for whom [PIP] benefits are provided," and describes the arbitration process that must be followed to pursue the subrogated claims.[97] And it specifically provides that the PIP insurer's subrogated rights are "limited to the maximum amounts of the tortfeasor's liability insurance coverage available for the injured party after the injured party's claim has been settled or resolved." Based on this unambiguous language, it is clear that any recovery of PIP deductibles must be limited to the liability coverage that remains after the PIP insured's bodily injury claim against the tortfeasor has been resolved.

AIIC contends that, in addition to prescribing the limited funds available to satisfy a PIP (or PIP deductible) subrogation claim, § 2118(f) also implicitly prescribes the time frame within which the subrogation claim may brought. Specifically, AIIC argues that it may not initiate the subrogation action until after the underlying bodily injury claim has been resolved.[98] At first glance, AIIC's argument makes perfect

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[96] *Id.*

[97] *Id.* at § 2118(g)(1)-(6).

[98] Def. Op. Br. 9.

sense. The PIP carrier cannot ascertain what funds, if any, will be available to reimburse the PIP deductible until after the bodily injury claim has been resolved. But the statute itself does not prohibit the PIP carrier from initiating the subrogation action until after the resolution of the bodily injury claim. Indeed, to the contrary, § 2118(g)(5) states: "[n]othing contained herein shall prohibit a liability insurer from paying the subrogated claim of another insurer prior to the settlement or resolution of the injured party's claim." This provision goes on to explain that if the liability carrier pays more on the subrogation claim than is statutorily available after the resolution of the bodily injury claim, then the PIP carrier must reimburse the liability carrier the excess payment.[99] This provision suggests that the PIP carrier can, if it chooses, initiate the PIP (or PIP deductible) subrogation claim prior to the expiration of the bodily injury claim. If it does so, however, it may well have to pay back some of the subrogation recovery in the event it recovers more than is statutorily permissible. In the case of a deductible, this likely would influence the timing of the PIP carrier's payment of the recovered deductible to its insured.

The Court may ultimately conclude that AIIC is correct in asserting that, in the good faith exercise of its statutory and contractual obligations, it need not initiate a

[99] *See* 21 *Del. C.* § 2118(g)(5).

PIP (or PIP deductible) subrogation action until after the resolution of its insured's bodily injury claim. The fact that Stratton made no reference to the status of his bodily injury claim in his Amended Complaint, however, is no basis to dismiss his declaratory judgment claim for failing to state a legally viable cause of action.

4. The Subrogation Statute Of Limitations Does Not Necessarily Trigger The PIP Insurer's Obligation To Initiate Recovery Of PIP Deductibles

The PIP insurer has three years from the date "the PIP benefit is paid to or for its insured" to initiate a PIP subrogation action.[100] By extension, then, the PIP insurer would have three years from the insured's final deductible payment to pursue recovery of the PIP deductible. AIIC contends that Stratton's Amended Complaint is defective as a matter of law because he did not (because he could not) allege that AIIC failed to pursue recovery of his PIP deductible within the applicable statute of limitations. In other words, AIIC would have the Court declare as a matter of law that the PIP carrier discharges its statutory and contractual duty to its insured in all events so long as it initiates recovery of the PIP deductible at some point (even the day) prior to the expiration of the three-year statute of limitations.[101] According to AIIC, Stratton's

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[100] *See Harper*, 703 A.2d at 140-41.

[101] *See* Def. Op. Br. 8.

"Amended Complaint is likely premature because it has been filed before the statute of limitations applicable to AIIC has run on AIIC's subrogation deadlines for other AIIC insureds potentially covered by plaintiff's proposed definition of the subclass."[102]

Stratton contends that the Court must consider several factors, including the insurer's duty of good faith and fair dealing, when determining the point at which the carrier must initiate the subrogation action to recover PIP deductibles.[103] According to Stratton, "a statute of limitations is not a claims handling guideline."[104]

The Court's first reaction to AIIC's statute of limitations revives a familiar theme – nothing in the PIP statute would expressly permit a PIP carrier to engage in a regular practice of carrying the insured's right to recover PIP deductibles to the brink of the statute of limitations before initiating its subrogation action. Of course, nothing in the PIP statute would expressly prohibit the practice either. At this stage of the proceedings, the Court cannot declare, as a matter of law, what impact, if any, the applicable statute of limitations will have on the PIP carrier's obligation to recover PIP deductibles for its insureds. The Amended Complaint adequately states the claim. As discussed below, the determination of whether the claim will prevail must await

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[102] *Id.*

[103] Pl. Ans. Br. 22-23.

[104] *Id.*

another day.

5. The Record Must Be Developed Further Before The Court Can Assess The Scope Of AIIC's Statutory and Contractual Obligation To Recover PIP Deductibles

"It has been called a golden rule of statutory interpretation that, when one of several possible interpretations produces an unreasonable result, that is a reason for rejecting that interpretation in favor of another which would produce a reasonable result."[105] Stated differently, "[i]t is a 'well established principle of statutory interpretation that the law favors rational and sensible construction.'"[106]

The Court already has determined that the PIP statute clearly imposes mandatory obligations upon the insurer with regard to the recovery of PIP deductibles. The scope of these obligations, however, is not readily discernable from the statute itself. For instance, the statute does not speak to the scenario where the insurer determines that its insured was primarily or exclusively at fault for the accident. Surely the General Assembly did not intend that PIP insurers must pursue their insured's deductibles when there is no reasonable prospect of recovery. But the

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[105] 2A Sutherland, *Statutes & Statutory Construction,* § 45:12 (7th Ed. 2008). *See Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985) ("Ambiguity may also arise from the fact that giving a literal interpretation to words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature.").

[106] 2A Sutherland, *Statutes & Statutory Construction,* § 45:12 (7th Ed. 2008).

statutory language "insurers shall recover any deductible for their insureds," on its face, might well be read to require this result.[107]

As stated, the Court is obliged to interpret the PIP statute in a manner that will fulfill the legislative intent but avoid an "unreasonable result."[108] To do so, the Court "may consider the background of the enactment, the circumstances attending the passage, and the effect the statute may have under the suggested construction."[109] AIIC's "suggested construction" of the PIP statute - - that its obligation to pursue PIP deductibles is permissive, triggered only by its payment of PIP benefits and only after the deductible is exhausted - - has already been rejected by the Court as inconsistent with the mandatory language of the statute. For his part, Stratton appears to recognize the unreasonableness of any interpretation of the PIP statute that would require the insurer to pursue the insured's PIP deductible "come what may," so he offers a construction that would temper the insurer's mandatory obligation with a notion of

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[107]This mandate stands in contrast to the permissive nature of the PIP carrier's statutory right to pursue subrogation of its PIP payments to its insured. *See* 21 *Del. C.* § 2118(j)(5)("The right to require such [PIP] arbitration shall be purely optional....").

[108] 2A Sutherland, *Statutes & Statutory Construction,* § 45:12 (7th Ed. 2008)("It is important that a statute not be read in an atmosphere of sterility, but in the context of what actually happens when human beings go about the fulfillment of its purposes.").

[109] *Four B. Corp. v. Daicel Chem. Indus., Ltd.*, 253 F.Supp.2d 1147, 1152 (D. Kan. 2003).

good faith.[110] Of course, the phrase "good faith" appears nowhere in the statute. And Stratton provides no clear sense of how the Court can further define the obligation of "good faith" within the confines of statutory construction.[111] Simply stated, neither party has yet to offer a construction of the PIP statute that comports with the statutory language or that follows a clear path to the legislative intent.[112] This leaves the Court in the difficult position of either enforcing a clear but likely unintended (and unreasonable) statutory mandate, choosing between two unattractive proffered constructions of the statute, or attempting in some way within the confines of accepted statutory construction to further define or, at least, refine the statutory obligation in a manner that provides meaningful guidance to insurers and insureds, and avoids

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[110] *See* Am. Compl. WHEREFORE CLAUSE, c (seeking a judgment "[d]eclaring that AIIC must attempt *in good faith* to recover applicable PIP deductibles on behalf of class members") (emphasis supplied).

[111] *See e.g.* Pl. Ans. Br. 23-24; Pl. 1st Ans. Br. 9 (noting that "there is no great difficulty infusing [the] standard of reasonableness," but failing to explain on what authority the Court could do so and failing to define the standard beyond use of terms like "good faith," "prompt," "fair," "reasonably clear," and "reasonable." A construction of the statute that incorporated only these amorphous standards would hardly provide any direction to PIP insurers regarding the discharge of their statutory obligations and would likely expose them to constant claims from insureds alleging that their carriers had acted "unreasonably."

[112] *cf. Four B. Corp.*, 253 F.Supp.2d at 1152 (noting that the record was lacking evidence of legislative intent, the court reluctantly chose between the parties' competing proffered constructions of the statute at issue).

unreasonable consequences.[113]

Unfortunately, in this case, neither the legislative history nor the expressed legislative intent supplied by the parties thus far reveal the intended meaning of the statute's apparent mandate that PIP insurers "shall recover any deductibles for their insureds." The Court's own review of this extrinsic information likewise has failed to unveil the General Assembly's intent regarding the PIP insurer's obligation to recover PIP deductibles for its insureds. If permitted by the Canons of statutory construction, the Court would consider extrinsic evidence of industry custom and practice, and of the resources that must be expended to pursue PIP deductibles, before attempting a construction of this aspect of the PIP statute. It is not clear to the Court, however, whether the presentation of this type of extrinsic evidence would be consistent with the Court's requisite focus on legislative intent. Here again, the parties have not addressed this issue in their submissions,[114] and the Court's own research has not answered the question to the Court's satisfaction. Further briefing is needed before the Court can determine whether extrinsic evidence beyond legislative history

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[113] The Court is not prepared at this stage of the proceedings to declare that the entire scheme by which PIP insurers are to recover deductibles is a nullity simply because it does not specify the exact means by which the insurer is to fulfill its mandate.

[114] In his brief in opposition to AIIC's initial motion to dismiss, Stratton indicates that he intends of take "discovery" but does not identify specifically what discovery he would seek or for what purpose. *See* Pl. 1st Ans. Br. 2, 14.

may be presented, or whether the Court's tools of construction are limited to Canons of "intrinsic" construction and whatever sources of legislative intent/history the parties are able to locate.

In addition to seeking a declaration regarding the "parties' rights, duties, status or other legal relations" under the PIP statute, Stratton also seeks the same declaration with respect to the "disputed insurance contracts." [115] Needless to say, the Court cannot make this declaration in a vacuum. A thoughtful assessment of the insurer's contractual obligations requires the consideration of industry customs, practice and resource allocation. This evidence will assist the Court as it addresses the many open questions here, including: (a) when, if ever, may the PIP carrier in good faith decline to pursue recovery of the PIP deductible; (b) what steps must the PIP carrier take to assess in good faith the viability of a particular PIP deductible subrogation claim; (c) when in the claims handling process must the PIP carrier take those steps; (d) to what extent may the insurer engage in a cost/benefit analysis when determining in good faith whether to attempt recovery of the PIP deductible; and (e) notwithstanding Stratton's well plead allegations, will a fully developed record enable the Court to provide a definitive declaratory judgment with regard to the PIP carrier's contractual (or statutory) obligations to pursue recovery of PIP deductibles given the potentially

[115] *See* Am. Compl. WHEREFORE CLAUSE, b.

unlimited range of factual scenarios under which this duty will arise?

C. Stratton Has Joined All Necessary Parties

AIIC alleges that, pursuant to Rule 12(b)(7), the Amended Complaint should be dismissed because Stratton has failed to join necessary parties as defined by Rule 19(a), namely the insurance companies of all putative class members and the insurance companies of those involved in accidents with all putative class members. Under Rule 19(a), a party must be joined in the litigation if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.[116]

At this stage, the Court cannot say for certain that the other insurance companies are necessary parties, although it appears unlikely. Stratton seeks a declaratory judgment clarifying his insurer's obligation under the PIP statute or the applicable policies of insurance, he does not seek a ruling as to whether any particular member of the proposed class or subclass is entitled to recover from any tortfeasor's carrier. And, of course, he does not seek any monetary damages, either for himself or the

[116] Super. Ct. Civ. R. 19(a).

members of the putative class or subclass. Based on these claims, it is difficult to foresee how the tortfeasors or their insurers would have a litigable interest in this case.

Even if the other insurers were later deemed necessary parties, Rule 19 provides a framework within which the Court can determine whether joinder is feasible, and also contemplates several remedies short of dismissal.[117] While the other insurance companies' interests may be implicated by Stratton's suit in ways not apparent now, the Court is satisfied that joinder can be effected at a later time with minimal prejudice to the current or any later-joined parties. Given the parties' sparse argument on this issue,[118] the Court is not convinced that the other carriers are necessary parties and, in any event, is quite satisfied that dismissal is not warranted under Rule 12(b)(7) on this record.[119]

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[117] *Id.* 19(a)-(b). *See also Roberts v. Delmarva Power & Light Co.*, 2007 WL 2319761, at *2 (Del. Super. Aug. 6, 2007) ("If the party is necessary, it must be joined if feasible to do so . . . . If the party is necessary and joinder is feasible, then the Court shall order that the person be made a party . . . . *The Rule does not provide for dismissal at this stage* . . . . [I]f the party is 'necessary' under Rule 19(a), but joinder is not feasible, then the Court must determine whether 'in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable.'")(emphasis added) (footnotes omitted)).

[118] AIIC and Stratton both dedicate less than two pages to argument on this question. *See* Def. Op. Br. 10-11; Pl Ans. Br. 24. Neither party cited any case law or authority other than the rules themselves in support of their respective positions.

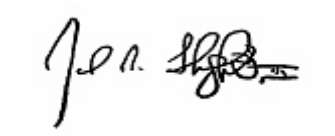
[119] *Roberts*, 2007 WL 2319761, at *3 ("When presented with a Rule 12(b)(7) motion, the Court places an initial burden on the party raising the defense to show that the person who was not joined is needed for a just adjudication.") (citing *John Hancock Property & Cas. Co.*, 859 F.Supp. 165, 168 (E.D. Pa. 1994)).

VI.

The parties are directed to submit a form of order that calls for limited, expedited discovery on the standing issue, and sets forth a briefing schedule to address any further motion practice on that issue. If Stratton is able to establish his standing to bring this action, the Court will enter an order that calls for: (1) further briefing on the statutory interpretation issues as discussed above; (2) if appropriate, a period of discovery, including expert discovery, to assist the Court in its interpretation of the relevant provisions of the PIP statute; (3) discovery, including expert discovery, to address the questions noted above relating to the insurer's duty of good faith; (4) if appropriate, a process for determining class certification issues; and (5) a further dispositive motion deadline. If the claims are ripe for summary disposition, the Court will enter the appropriate order upon full briefing. If not, and if procedurally appropriate, we will proceed to trial.

Based on the foregoing, AIIC's Motion to Dismiss the Amended (Proposed) Class Action Complaint is hereby **DENIED**.

IT IS SO ORDERED.



Joseph R. Slights, III, Judge

Original to Prothonotary